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THE CONSUMER PROTECTION AGAINST PRICE FIXING ACT OF 1989

MARCH 8 (legislative day, JANUARY 23), 1990.—Ordered to be printed

Mr. MITCHELL (for Mr. BIDEN), from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany S. 865, as amended]

The Committee on the Judiciary, to which was referred the bill (S. 865) to amend the Sherman Antitrust Act, having considered the same, reports favorably thereon with amendments and recommends that the bill, as amended, do pass.

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I. PURPOSE

Vertical price-fixing has been *per se* illegal for over 75 years. S. 865 codifies this rule, modifies the evidentiary requirements to

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reach a jury, and reestablishes that certain types of agreements are automatically illegal.

II. Legislative History

In 1911, the Supreme Court held that vertical price fixing is *per se* illegal under the Sherman Act. *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.,* 220 U.S. 373 (1911). While the Supreme Court has preserved the unilaterial right of a business entity to deal with whomever it chooses and currently judges nonprice vertical restraints under the rule of reason, the Supreme Court has never waivered from the view that vertical price fixing is *per se* illegal. See, e.g., *Continential T.V., Inc.* v. *GTE Sylvania, Inc.,* 433 U.S. 36, 51 n. 18 (1977); *Albrecht* v. *Herald Co.,* 390 U.S. 145 (1968); *Schwegmann Bros.* v. *Calvert Distillers Corp.,* 341 U.S. 384 (1951); *United States* v. *Bausch & Lomb Optical Co.,* 321 U.S. 707 (1944); *Straus* v. *Victor Talking Machine Co.,* 243 U.S. 490 (1917). Vertical price fixing violates the Sherman Act because it suppresses vigorous competition by independent entrepreneurs and adversely affects consumer welfare. Free enterprise presupposes the independence of competing business entities. This independence fosters creativity, hard work, and vigorous competition. Competition, in turn, promotes consumer welfare by encouraging lower prices, higher quality, and a greater variety of products and services.

In 1975, Congress expressly reiterated the unlawfulness of vertical price fixing through enactment of the Consumer Goods Pricing Act. 89 Stat. 801, amending 15 U.S.C. 1, 45(a), See also *Continental T.V., Inc.* v. *GTE Sylvania Inc.,* 433 U.S. 36, 51 n. 18 (1977). This act repealed antitrust exemptions for the so-called "fair trade" laws at the State level. The "fair trade" laws allowed manufacturers to mandate a minimum or stipulated price at which a product could be resold. The outlawing of "fair trade" was a bipartisan effort and was actively supported by the Department of Justice and by the Federal Trade Commission.

The Senate report accompanying the Consumer Goods Pricing Act took note of two studies conducted by the Justice Department. One, cited in a 1969 Economic Report of the President, indicated that consumers would save $1.2 billion a year by elimination of the "fair trade" laws. The other estimated that "fair trade" laws increased the price of fair-traded goods by 18 percent to 27 percent. S. Rpt. No. 466, 94th Cong., 1st Sess. 3 (1975). The Senate report concluded:

> Fair trade laws are in fact legalized price-fixing. They permit competing retailers to have identical prices and thus eliminate price competition between retailers. Id. at 3.

Former President Ronald Reagan, then a columnist for the Copley News Service, was among those who supported the elimination of the "fair trade" laws. In a column reprinted in the Congressional Record, Mr. Reagan condemned the fair trade laws as stifling competition, adding to inflation, and bereft of consumer benefits.[1]

[1] 121 Cong. Rec. 1268 (1975).

During the last decade, the harmfulness of vertical price-fixing has been questioned by some scholars and even by some in the previous administration. In fact, in the early eighties, the Department of Justice intervened in court on behalf of defendants in several private vertical price-fixing cases.[2] Most notably, in 1983, the Department filed an amicus curiae brief with the Supreme Court in *Monsanto Co.* v. *Spray-Rite Corp.* urging abandonment of the *per se* rule for vertical price-fixing. The Supreme Court declined to address the Department's arguments:

> Certainly in this case we have no occasion to consider the merits of this argument. This case was tried on *per se* instructions to the jury. Neither party argued in the district court that the rule of reason should apply to a vertical price-fixing conspiracy, nor raised the point on appeal. In fact, neither party before this court presses the argument advanced by amici. We therefore decline to reach the question * * *. 465 U.S. 752, 761 n. 7 (1984).

Prior to oral argument in *Monsanto,* Congress expressed its continued belief that vertical price-fixing is *per se* illegal and directed the Justice Department not to seek to change the *per se* standard. The Department of Justice appropriations bill for fiscal 1984 prohibited the expenditure of funds to seek a court opinion overruling the *per se* rule against vertical price-fixing:

> None of the sums authorized to be appropriated by this act may be used for any activity the purpose of which is to overturn or alter the *per se* prohibition of resale price maintenance, in effect under the federal antitrust laws, except that nothing in this section shall prohibit any employee of the Department of Justice from presenting testimony on this matter before appropriate committees of the House of Representatives and the Senate. Public Law 98–166, section 510.

The appropriations bill for fiscal 1985 deleted all reference to vertical restraints upon the Assistant Attorney General's assurance that the Department would respect current law and congressional intent concerning the *per se* rule. See the conference report on H.R. 5712, Public Law 98–411.

After Congress lifted the appropriations ban, the Department of Justice promulgated its "Vertical Restraints Guidelines." Although these guidelines purported to deal only with nonprice restraints, they appear to narrow the *per se* approach to vertical price-fixing.

The guidelines led Congress once again to adopt restrictions on the Department of Justice through appropriations bills. The fiscal 1984 funding restriction was also included in both the fiscal 1987 and 1988 Department of Justice appropriations bills. Public Law 99–1005, section 605, and Public Law 100–202, section 605. The fiscal 1986 appropriations contained the fiscal 1984 funding restrictions as well as a bipartisan resolution expressing opposition to the Vertical Restraints Guidelines. This resolution declared that the guidelines:

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[2] During this period, the Justice Department filed no vertical price-fixing cases.

(1) are not an accurate expression of the Federal antitrust laws or congressional intent concerning vertical price and nonprice restraints;

(2) should not be treated by the courts as binding or persuasive; and

(3) should be recalled. See S. Con. Res. 56 and H. Res. 303.

By codifying current law, S. 865 is intended to eliminate any confusion about the *per se* illegality of vertical price-fixing.

S. 865 also clarifies current law on an evidentiary issue that may arise during a vertical price-fixing case.

Since the Supreme Court's decision in *Monsanto Co.* v. *Spray-Rite Service Corp.,* 465 U.S. 752 (1984), there has been some confusion on the part of lower courts as to when the courts may grant defendants' summary motions, such as motions for summary judgment, for a directed verdict, or for judgment notwithstanding the verdict. Some courts, applying the ambiguous language in *Monsanto,* have inappropriately dismissed cases or imposed incorrect standards of proof in vertical price-fixing cases.

An essential element in a vertical price-fixing case is proof of an illegal agreement between entities on different levels of the distribution chain. S. 865 requires that the factfinder be permitted to consider certain evidence when deciding whether there was an illegal agreement between a seller and a reseller. This evidence relates to a seller's termination of or refusal to deal with a reseller, because of a request, demand, or threat of a competing reseller. S. 865 ensures that relevant evidence is presented to the factfinder. It does not alter the requirement that the plaintiff prove a conspiracy or that the plaintiff bear the burden of proof.

In the 100th Congress, the Judiciary Committee, by voice vote, reported out S. 430, the predecessor to S. 865. Following the committee action, the Supreme Court announced its decision in *Business Electronics Corp.* v. *Sharp Electronics Corp.,* 485 U.S. 717 (1988). That decision was a radical departure from prior resale price maintenance case law in that it held that a conspiracy between a supplier and a dealer to terminate a competing dealer in order to curtail price competition was not *per se* illegal, but should be judged under a more lenient rule of reason test. The Supreme Court said that a plaintiff must show that conspiring parties had agreed on a price or price level for the relevant goods in order for the agreement to be reviewed under a *per se* test.

During floor consideration, Senators Rudman and Wilson proposed several amendments, including one which would have specifically overruled the Sharp decision. All these amendments have been incorporated in S. 865.

III. Committee Action

S. 865 was introduced by Senators Metzenbaum, Rudman, Simon, Wilson, and Bradley on April 19, 1989. A hearing on the bill was held on June 1, 1989. The committee, with a quorum present, approved an amendment by Senator Kohl by voice vote and approved the bill, 7–6, on February 22, 1990.

IV. Discussion

S. 865 addresses three aspects of the law relating to vertical price-fixing.

A

Section 8(a) addresses a type of vertical price-fixing case in which it is claimed that a business entity has attempted to eliminate or reduce price competition from a competitor by agreeing with a common supplier that the supplier will terminate or refuse to supply the competitor. Since the Supreme Court decided *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752 (1984), 6 years ago, there has been considerable confusion in the lower courts about the evidence that the terminated dealer in such a case must present to defeat summary motions and send its case to the trier of fact.

The Supreme Court in *Monsanto* did not change the elements of a vertical price-fixing conspiracy; it described evidence which, if presented by a plaintiff, would be insufficient to avoid summary judgment in favor of the defendant as a matter of law. The Supreme Court stated that "something more than evidence of complaints" by competitors about a terminated dealer's pricing was needed for the trier of fact to infer the existence of an illegal conspiracy. 465 U.S. at 764. The plaintiff prevailed in *Monsanto* because it had presented additional evidence in the trial that tended to show a conspiracy.

The problem has occurred in the lower courts that have interpreted the *Monsanto* decision to impose new and additional burdens on a plaintiff in a vertical price-fixing case. For example, the Supreme Court in *Monsanto* said that a plaintiff dealer, which had been terminated following or "in response to" price-related complaints by competitor dealers, could not raise a triable issue unless it produced evidence that "tends to exclude the possibility" that the supplier had acted independently. 465 U.S. at 763, 764. This language has been misapplied to justify inappropriate summary dispositions against plaintiffs.

These subsequent lower court decisions have suggested, for example, that even if the termination was directly caused by the price-related complaints of a competing dealer, and even if the complaints were accompanied by economic duress, coercion and threats, the plaintiff could not get to the trier of fact unless it also offered independent proof of a resale-price arrangement between the supplier and one or more other complaining dealers. These requirements are too severe. S. 865 is intended to remedy their effect.

S. 865 clarifies how the *Monsanto* decision should be applied. It directs Federal courts, when ruling on a summary motion, to determine whether there is sufficient evidence from which a trier of fact could reasonably conclude that:

(1) a dealer made an express or implied request, demand, or threat to a supplier that the supplier take steps to curtail or eliminate price competition, and

(2) that because of such request, demand, or threat, the supplier terminated or refused to continue to supply goods to a second dealer.

In presenting this evidence, the plaintiff must be able to show that the request, demand, or threat was "the major cause" of a dealer's termination. The court's determination as to whether a trier of fact could reasonably find these predicate facts is to be made on the basis of all the record evidence—defendant's as well as plaintiff's—looking at such evidence in the light most favorable to the nonmoving party. If the court determines that a trier of fact could reasonably conclude that concerted action had occurred, the trier of fact would then be able to make the determination, on the basis of all the evidence presented in the case, whether there had been an illegal vertical price-fixing conspiracy.

The standards by which the court would evaluate the evidence under subsection (a) are prescribed by the Federal Rules of Civil Procedure and are not altered by the legislation. In addition, section 8(a)(2) specifically states that the court shall grant summary judgment if the trier of fact could only find concerted action by making inferences which are implausible.

While S. 865 addresses the inappropriate granting of summary motions against plaintiffs, it does not prevent a court from granting summary dispositions in favor of defendants in vertical price-fixing cases where the standards of the bill are not met.

S. 865 does not address every route a plaintiff may take in reaching the factfinder in a vertical price-fixing case. It deals with the route to the factfinder which has been inappropriately closed on the basis of language in the *Monsanto* opinion. In addition, S. 865 does not change the elements of conspiracy law. *American Tobacco Co.* v. *United States,* 328 U.S. 781, 810 (1946).[3]

Section 8(b) is designed to codify the *per se* prohibition against vertical price-fixing. *Dr. Miles Medical Co.* v. *John D. Park & Sons, Co.,* 220 U.S. 373 (1911). The Supreme Court has consistently and properly held that vertical price-fixing is *per se* illegal. *Business Electronics Corp.* v. *Sharp Electronics Corp.,* 485 U.S. 717 (1988); *324 Liquor Corp.* v. *Duffy,* 107 S. Ct. 720 (1987); *Monsanto Co.* v. *Spray-Rite Corp.,* 465 U.S. 752 (1984); *Rice* v. *Norman Williams Co.,* 458 U.S. 654 (1982); *California Liquor Dealers* v. *Midcal Aluminum, Inc.,* 445 U.S. 97 (1980); *Simpson* v. *Union Oil Co., 377 U.S. 13 (1964); United States* v. *Parke-Davis & Co.,* 362 U.S. 20 (1960); *Kiefer-Stewart Co.* v. *Jos. E. Seagram & Sons, Inc.,* 340 U.S. 211 (1951); *United* v. *Line Material Co.,* 333 U.S. 287 (1948); *F.T.C.* v. *Beech-Nut Packing Co.,* 257 U.S. 441 (1922); *United States* v. *Schrader's & Son,* 252 U.S. 85 (1920); and *United States* v. *Colgate Co.,* 250 U.S. 300 (1919). See also *Continental T.V. Inc.* v. *GTE Sylvania Co.,* 433 U.S. 36 (1977) (dictum). Section 8(b) is not, however, designed either to codify or change the specific applications of the *per se* rule; courts can continue to develop the law in this area within the constraints imposed by S. 865.

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[3] The parties to the illegal agreement need not be motivated by the same interest. For example, a distributor may enter into an agreement motivated by the desire to eliminate or restrict price competition from a competing distributor. The supplier, on the other hand, may go along with the agreement to pacify the distributor even though it might benefit from the distributor's pricing policy. Coercing a party into an illegal agreement does not exonerate the coerced party from civil liability. On the other hand, the mere fact that a party has been coerced into an agreement does not in itself transform a lawful agreement into an unlawful one. *United States* v. *Paramount Pictures,* 334 U.S. 131, 161 (1948). See also *Simpson* v. *Union Oil Co.,* supra, 377 U.S. 13, 17 (1964), and *Eastern States Lumber Ass'n* v. *United States,* 234 U.S. 600, 611–12 (1914).

Section 8(b) has an important objective. Certain scholars and some officials in the previous administration made statements that the *per se* prohibition against vertical price-fixing was outmoded and should be modified. Additionally, the courts have increasingly undermined the viability of the *per se* rule for vertical price-fixing. As a result, many business people may have become confused and may have been tempted to engage in conduct that is unlawful. S. 865 is intended to clear up any confusion once and for all. The *per se* standard is preserved.[4]

The reason for the outright prohibition against price-fixing has been variously stated by the Supreme Court over the years and is based on the purposes of the Sherman Act. The Sherman Act, in part, is meant to provide every business, no matter how small, with the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. Thus, when collusion restricts price competition or robs a firm of the freedom to determine how much it will charge for its products or services, competition is restrained and consumers suffer. Section 8(b) restates plainly and unequivocally that all forms of vertical price-fixing are illegal *per se* under the antitrust laws. In codifying this absolute prohibition, Congress makes clear that efforts to qualify, trivialize, or dilute the *per se* rule are disapproved as a matter of legislative policy.

In codifying vertical price-fixing agreements as *per se* unlawful under section 1 of the Sherman Act, S. 865 makes clear (in section 4 of the bill) that the *per se* rule does not apply to unilateral behavior—that is, conduct which is not the result of a contract, combination, or conspiracy—since unilateral behavior is not covered by section 1. See *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919).

S. 865 also does not apply to non-price vertical restraints. *Continental T.V. Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977), still governs the legality of non-price vertical restraints. Section 5 of the bill specifically states that the rule of reason standard still applies to vertical location clauses or vertical territorial restraints. This section is not meant to list all the possible non-price vertical restraints that are to be treated under the rule of reason.

Section 8(b) also overrules the recent Supreme Court decision in *Business Electronics Corporation* v. *Sharp Electronics Corporation*, 485 U.S. 717 (1988). The *Sharp* case presented what appeared to be a classic resale price maintenance case in which a high-priced retailer complained to its supplier about the prices being charged by a discount dealer (its only competitor) and demanded that the supplier terminate the discounter. The supplier acceded to the demand

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[4] The importance of the *per se* standard cannot be overstated, since the alternative, the rule of reason standard, can have a tremendous impact on a plaintiff's case. The Supreme Court recently reaffirmed why *per se* rules are so important:

> The rationale for *per se* rules in part is to avoid a burdensome inquiry into actual market conditions in situations where the likelihood of anticompetitive conduct is so great as to render unjustified the costs of determining whether the particular case at bar involves anticompetitive conduct.
>
> *FTC* v. *Superior Court Trial Lawyers Assn.*, No. 88-1198, slip op. at 19, n. 15 (U.S., January 22, 1990) (quoting *Jefferson Parish Hospital District No. 2* v. *Hyde*, 466 U.S. 2 (1984)).

Many plaintiffs faced with the expense of pursuing a case under the rule of reason standard may forgo a lawsuit.

and cut off the discounter. The Supreme Court held that an agreement between a manufacturer and a dealer to terminate a discount dealer because of the prices charged was not sufficient to find a *per se* violation of the antitrust laws. The Court said that in order to find a *per se* illegal vertical restraint there must also be a showing of a second agreement by which another dealer agreed to charge a specific price or price level for its products. ("* * * a vertical restraint is not illegal *per se* unless it includes some agreement on price or price levels." Id. at 735.)

This holding represents a major departure from previous vertical price-fixing case law and has alarming implications. It means that a manufacturer and a high-priced retailer could conspire to remove from the marketplace a competing retailer *solely* because that retailer is a discounter, as long as they did not agree on a specific price to charge after the discounter was terminated. Prior to *Sharp,* leading cases had held that such a vertical agreement to eliminate a competing dealer would be treated as *per se* illegal. *Zidell Explorations, Inc.* v. *Conval Int'l, Ltd.,* 719 F. 2d 1465 (9th Cir. 1983), *Cernuto, Inc.* v. *United Cabinet Corp.,* 595 F. 2d 164 (3d Cir. 1979). The result in *Sharp* is untenable.

When a competitor is eliminated pursuant to a vertical agreement solely because of its pricing policies, the impact on competition and consumer welfare is clear. The harm is most obvious where, as was the case on the *Sharp* facts, there is no other competing retailer in the marketplace. With the elimination of the only other competition, the remaining dealer is free to raise prices without fear of losing sales to a competitor. It does not take a separate agreement on a price or price levels for the conspiring parties to eliminate competition, undermine the marketplace, and hurt consumers.

Although a recent decision, *Sharp* has already fundamentally changed the landscape for resale price maintenance cases. see, e.g., *The Jeanery, Inc.* v. *James Jeans, Inc.,* 849 F. 2d 1148 (9th Cir. 1988), ("Business Electronics teaches that a manufacturer can agree to terminate a price-cutting distributor in response to a complaint from another dealer." at 1160.). An even more recent case, *Toys "R" Us, Inc.,* v. *R.H. Macy & Co., Inc.,* 1990-1 Trade Cases 68,890 (S.D.N.Y. 1990), provides an excellent example of how the *Sharp* decision permits clearly anticompetitive behavior to go unpunished.

The *Toys "R" Us* case is a classic resale price maintenance case in which one retailer opportunes a supplier to help eliminate price competition in the marketplace. The facts of the case are that two suppliers of children's swimwear were selling their goods to both Macy, which traditionally prices its merchandise at approximately twice the manufacturer's wholesale price, and Kids "R" Us, a discount retailer. Macy had adopted a policy of meeting any retail price of children's wear offered by a competitor. Concerned that its profits would be harmed by having to meet the prices charged by its competitor, Kids "R" Us, Macy complained to its suppliers. For the purposes of the decision, the court assumed that "the sole precipitating case of [the suppliers'] refusal to sell certain lines of swimwear to Kids was the protest by Macy." Id. at 62,789. The court stated that under the *Monsanto* decision the evidence could

justify the finding of agreements between Macy and its suppliers to deny merchandise to Kids. The court found that, under *Sharp,* there was no *per se* liability because there was no showing of an agreement setting prices or price levels.

The clear purpose and effect of the admitted conspiracy between Macy and its suppliers was to raise prices. No other reason for the conspiracy was ever considered by the court. The facts of this case clearly evidence harm to competition and ultimately to consumers. Instead of being able to buy the suppliers' goods from Kids at discount prices and have those prices met by Macy, consumers were, as a result of the conspiracy, only able to buy at double the wholesale price to Macy. Yet, in spite of the obvious anticompetitive nature of the behavior and the results of that behavior, the court granted summary judgment for the defendant. This case and others like it are evidence enough that the *Sharp* decision cannot stand.

V. Text of S. 865, as Reported

[S. 865, 101st Cong., 2d sess.]

A BILL To amend the Sherman Act regarding retail competition

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as "The Consumer Protection Against Price-Fixing Act of 1989".

Sec. 2. The Congress finds that—

(1) consumer welfare is greatly enhanced by an ability to purchase goods and services at lower prices as a result of vigorous price competition;

(2) vertical price restraints generally have an adverse impact on competition that results in higher consumer prices;

(3) recent court decisions have so narrowly construed the laws against vertical price restraints that consumer welfare has been put in jeopardy; and

(4) it is necessary to enact legislation that protects the interests of consumers in vigorous price competition while recognizing the needs of manufacturers and others to maintain reasonable service, quality, and safety standards.

Sec. 3. The Sherman Act is amended by redesignating section 8 and any references to section 8 as section 9 and by inserting between section 7 and section 9, as herein redesignated, the following new section:

"Sec. 8. (a)(1)(A) In any civil action based on section 1 or 3 of this Act, including an action brought by the United States or by a State attorney general, or by the Federal Trade Commission under section 5 of the Federal Trade Commission Act, which alleges a contract, combination or conspiracy to set, change, or maintain prices, if pursuant to the Federal Rules of Civil Procedure the court finds that there is sufficient evidence, direct or circumstantial, from which a trier of fact could reasonably conclude that a person who sells a good or service to the claimant for resale entered into a contract, combination, or conspiracy with a competitor of such claimant to curtail or eliminate price competition by such claimant in the resale of such good or service, then the court shall permit the

trier of fact to consider whether such person and such competitor engaged in concerted action to set, change, or maintain prices for such good or service in violation of such section.

"(B) For purposes of paragraph (1), the court shall find the existence of 'sufficient evidence' that a person who sells a good or service entered into a contract, combination, or conspiracy if the claimant presents sufficient evidence that such person—

"(i) received from a competitor of the claimant an express or implied request or demand, including a threat to discontinue an existing business arrangement, that the seller take steps to curtail or eliminate price competition by the claimant in the resale of such good or service, and

"(ii) because of such request, demand, or threat terminated the claimant as buyer of such good or service for resale or refused to continue to supply to the claimant some or all of such goods or services requested by the claimant: *Provided,* That a termination or refusal to supply is made 'because of such request, demand, or threat' only if such request, demand or threat is the major cause of such termination or refusal to supply.

"(2) The court shall not permit the trier of fact to consider whether such person and such competitor engaged in concerted action to set, change, or maintain prices for such good or service in violation of such section if the court determines that the trier of fact could only find that such person and such competitor engaged in concerted action by making inferences which are implausible.

"(b) In any civil action based on section 1 or 3 of this Act, including an action brought by the Federal Trade Commission under section 5 of the Federal Trade Commission Act, which alleges a contract, combination, or conspiracy to set, change or maintain prices, the fact that the seller of a good or service and the purchaser of a good or service entered into an agreement to set, change, or maintain the resale price of a good or service shall be sufficient to constitute a violation of such section, except that this section shall not apply when the agreement to set, change, or maintain the resale price of a good or service is an agreement to set, change, or maintain the maximum resale price of a good or service. An agreement between the seller of a good or service and the purchaser of a good or service to terminate another purchaser as a dealer or to refuse to supply such other purchaser because of that purchaser's pricing policies shall constitute a violation of this section, whether or not a specific price or price level is agreed upon.".

SEC. 4. Nothing in this Act shall be construed to change the requirement of the Sherman Act that a violation of section 1 or 3 of that Act may only be found upon a determination that the defendant entered into an illegal contract, combination, or conspiracy.

SEC. 5. Nothing in this Act shall affect the application of the rule of reason standard to vertical location clauses or vertical territorial restraints under the antitrust laws.

VI. Section-by-Section Analysis

SECTION 1

This bill, when enacted, may be cited as "The Consumer Protection Against Price-Fixing Act of 1989."

SECTION 2

This section of the bill sets forth the congressional findings on vertical price-fixing.

SECTION 3

This section inserts a new section in the Sherman Act, 15 U.S.C. 1 et seq., designating the new section as section 8, and renumbering the existing section 8 as section 9.

Section 8(a)

The new section 8(a) describes the evidence that is sufficient to overcome a motion for summary judgment or directed verdict or judgment notwithstanding the verdict in certain kinds of civil actions under sections 1 and 3 of the Sherman Act. Section 8(a) preserves the role of the finder of fact, usually the jury, to determine credibility, weigh evidence, find facts, and determine whether the plaintiff's facts prove its case.

Paragraph 8(a)(1)(A)

Section 8(a) applies in "any civil action based on section 1 or 3 of * * * [the Sherman] Act, including an action brought by the United States, or by a state attorney general, or by the Federal Trade Commission under section 5 of the Federal Trade Commission Act." Consequently, it applies to civil vertical price-fixing cases initiated by the Federal or State governments as well as those initiated by private plaintiffs. The Justice Department may initiate such actions on behalf of the United States under section 4 of the Sherman Act and section 4A of the Clayton Act. State attorneys general may initiate such actions under sections 4, 4C, and 16 of the Clayton Act. And as noted in section 8(a), the Federal Trade Commission may initiate such actions under section 5 of the Federal Trade Commission Act. In cases brought by the Federal or State government, the committee intends that the word "claimant" in section 8(a) be understood to refer to any reseller of a good or service who could have maintained a private section against the defendants. While section 8(a) applies to actions by the Federal Trade Commission under section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, this section does not provide for a private right of action under the Federal Trade Commission Act.

Paragraph 8(a)(1)(A) provides that if the plaintiff presents "sufficient evidence, direct or circumstantial, from which a trier of fact could reasonably conclude" that the supplier of good or service entered into an agreement with a competitor of a reseller to curtail or eliminate price competition by plaintiff, then the court must allow the issue to be decided by the trier of fact. The court shall continue to apply the Federal Rules of Civil Procedure when imple-

menting this bill. The bill does not change the rule that plaintiff's evidence may be either direct or circumstantial.

Paragraph 8(a)(1)(B)

Paragraph 8(a)(1)(B) describes what is "sufficient evidence" that a person entered into a contract, combination, or conspiracy for purposes of paragraph 8(a)(1)(A). The plaintiff reseller, must show (i) that the supplier received from a competitor of the reseller an "express or implied request or demand" that the seller "take steps to curtail or eliminate price competition," and (ii) the reseller was terminated by the supplier "because of" such communication.

The bill identifies, as one example of a request or demand, a "threat to discontinue an existing business arrangement." An example of this type of a "threat" is a distributor informing one of its suppliers that the supplier has a choice of either continuing to supply it with goods or services, or continuing to supply the distributor's competitor with goods or services. A "request or demand" to take steps to curtail or eliminate price competition in the resale of a good or service, of course, could be made in many other ways.

The bill refers specifically to a "threat to discontinue an existing business arrangement" because evidence presented to the committee indicates that such a threat is frequently made in response to a competitor's pricing. Thus, the committee wanted to state explicitly that such a threat constitutes a "demand" to take steps to curtail or eliminate price competition in satisfaction of the requirement of paragraph 8(a)(1)(A).

Paragraph 8(a)(1)(B)(i)

An "express or implied request or demand, including a threat to discontinue an existing business arrangement, that the seller take steps to curtail or eliminate price competition" includes all threats or demands in which a competing dealer seeks a supplier's assistance in reducing price competition. The plaintiff cannot invoke section 8(a) simply by showing a price-related communication or complaint without showing that it constitutes the necessary "express or implied request, or demand * * * that the seller take steps to curtail or eliminate price competition" and without showing the necessary causation.

The phrase "steps to curtail or eliminate price competition" includes the termination of a reseller, refusal to supply a reseller, threats of such termination or refusal to supply, or attempts to induce a reseller to raise its price.

Paragraph 8(a)(1)(B)(ii)

As originally introduced, S. 865 used the phrase "refused to supply * * * some or all of such goods or services requested." An amendment offered by Senator Kohl changed this phrase to read "refused to *continue to* supply * * * some or all of such goods or services requested," which makes it clearer that the bill presupposes that the supplier is currently providing the seller in question with such goods or services. The goods or services subsequently denied "because of" its competitor's "suggestion," "request," "demand," or "threat" could be the same goods or services, next season's goods or services, the next model of such goods, goods or

services that contain a minor change from the original goods or services, or the like. For example, next season's clothes or next year's car model could be covered by this phrase.

It is the committee's intention that the supplier's "refusal to continue to supply" a completely new line, such as a high-price line of rainwear, which the supplier independently decides to market in a restricted fashion, not be covered by this phrase. The fact that this section does not cover a refusal to supply a completely new line, however, is not meant to suggest that a vertical price-fixing conspiracy could not involve such a refusal to supply. It does mean that the provisions of this section on getting a case to the trier of fact do not apply to such a refusal and such refusal would be governed by existing case law. The section also is not meant to cover a refusal to supply that is based on an allocation scheme for goods in short supply, unless the scheme discriminates among dealers on the basis of their pricing policies.

By its terms, section 8(a) requires that a plaintiff show more than that a termination or refusal to continue to supply simply followed in time a communication concerning price competition sent to his supplier by a competing dealer. The plaintiff must demonstrate that termination or refusal to continue to supply was "because of" the threat or demand. This requirement is not met unless a plaintiff shows that the threat or demand was "the major cause" of the termination or refusal to supply. This language seeks to ensure that de minimis or insignificant causation would not raise the inference under section 8(a).

As originally introduced, the requirement was that the communication be "the major contributing cause" of the termination. An amendment offered by Senator Kohl was adopted to delete the word "contributing" because it was believed that the word created potential confusion, and might have allowed plaintiffs to reach the jury in inappropriate circumstances. This is a fairer and more straightforward standard, one suggested by Senator Grassley at the committee hearing on the bill.

In cases where there were multiple causes for a termination or refusal to supply—that is, price competition, inferior handling of the supplier's product, failure to abide by contractual obligations, lateness of paying bills—a court need not find that the threat or demand to curtail or eliminate price competition was the sole cause of the termination or refusal to supply. The court would have to find that the request, demand or threat was the major cause.

Major causation would not automatically be established simply because a threat or demand was a link in a chain of events that led to termination or a refusal to supply. For example, a letter complaining about a dealer's pricing practices might trigger an investigation by the supplier that uncovers non-price-related grounds for a termination or refusal to supply. Where the weight of the evidence shows that other deficiencies by the dealer, such as maintaining a dirty showroom or failure to provide service for example, were the reason for the termination or refusal to supply, a trier of fact could not conclude reasonably that "major" causation existed and the bill would not apply. The committee recognizes that this situation can arise in service-intensive industries which require high-quality distribution networks.

Having made the showing provided by section 8(a), the plaintiff will be assured a trial (but not ultimate victory on the merits) if, viewed as a whole, the record could permit a legal conclusion at that procedural stage that the threat or demand was the major cause of the termination or refusal to supply.

Vertical price-fixing cases based on dealer termination and refusal to supply often involve questions of circumstantial evidence. The examples below list some of the types of circumstantial evidence that the plaintiff may introduce to support his claim of "major cause" and some of the types of evidence that the defendants may introduce to refute the claim. The listing is only illustrative—there may be other types of evidence that either plaintiff or defendants may show. The presence or absence of one or more of these factors on either side will frequently not be dispositive (in many cases, one or more factors may be present on both sides). The overall record will be the basis on which the court will decide whether a trier of fact could find "major cause."

Evidence that the supplier has only terminated dealers who have been the subject of such threats or demands, for example, would tend to establish the necessary causal connection; on the other hand, evidence that the supplier has also retained dealers despite communications or unilaterally terminated discounting dealers would tend to refute the causal connection. Evidence that the asserted deficiencies of the terminated dealer in sales or services persisted for a long period of time before the communication would tend to establish the connection; evidence that the deficiencies became more serious after the communication would tend to refute it. Evidence that resale prices tended to be uniform in defendant-competitor's marketing area, but the plaintiff's prices were aberrational, would tend to establish the connection; evidence that resale prices varied substantially in defendant-competitior's marketing area, and the plaintiff's prices were not aberrational, would tend to refute it.

Section 8(a) requires that if the plaintiff presents sufficient evidence from which a trier of fact could reasonably find the facts described in paragraphs 8(a)(1)(B)(i) and 9(a)(1)(B)(ii), "Then the court shall permit the trier of fact to consider whether such person and such competitor engaged in concerted action * * *." This language precludes the granting of defendant's summary motions if the requirements of the bill are satisfied. The language does not create any evidentiary presumption.

The committee did not address the question of whether this section could be applied to the situation where a maximum price-fixing agreement is alleged. The committee found it difficult to imagine the situation where a supplier would receive a request from a retailer charging a lower price to terminate another dealer because of that competing dealer's policy of charging a higher price. Take the example of a newspaper publisher who may want to set a maximum price for its paper so that it can keep the circulation up and maintain or increase its advertising revenue. As Senator Leahy said in his statement on the Senate floor about S. 430:

> Advertising revenues help keep the prices consumers pay for newspapers low. These revenues account for the

> bulk of a newspaper's earnings. An advertiser's willingness to advertise in a newspaper depends in large part upon the size of the newspaper's circulation or readership. By keeping the price of a newspaper low, a publisher generates a larger circulation which in turn attracts advertisers to that newspaper. Maintaining circulation is crucial to keeping a newspaper prosperous and its price to consumers low.

Section 8(a)(2)

This section emphasizes the fact that the courts continue to have the role of applying the standards of the amendment in accordance with the Federal Rules of Civil Procedure and the purposes of this legislation. It clarifies that if a reasonable person could only find the existence of a conspiracy by making implausible inferences, then the case should not go to the trier of fact.

This standard is consistent with current procedural interpretations of the Federal Rules of Civil Procedure. Vertical price-fixing cases frequently rely on circumstantial proof and inferences therefrom. Section 8(a)(2) does not mean that a case relying on such proof or inferences should be dismissed, unless the drawing of implausible inferences is the only way a trier of fact could find a conspiracy.

Section 8(b)

This section codifies the longstanding rule that vertical price-fixing is *per se* illegal with the exception of agreements to set, change, or maintain maximum resale prices. Maximum vertical price-fixing occurs when there is an agreement not to charge a price higher than an agreed upon price. This section of the bill simply does not apply to maximum vertical price-fixing and would not affect the development of case law in this area.

The section states that

> The fact that the seller of a good or service and the purchaser of a good or service entered into an agreement to set, change, or maintain the resale price of a good or service shall be sufficient to constitute a violation of such section.

In using the term "the resale price," this language does not mean that a vertical price-fixing conspiracy must involve an agreement between a supplier and a reseller on a specific price to be charged by the reseller of a good or service. While this is certainly one of the traditional formulations of a vertical price-fixing conspiracy, the agreement on a specific price or price level is not an essential feature of a vertical price-fixing case. As the next sentence makes clear, an agreement to terminate a competing dealer because of that dealer's "pricing policies" will constitute a violation, whether or not a specific price or price level is agreed upon. This language is meant to affirm that all forms of vertical price-fixing are illegal *per se*. The term "pricing policies" refers to the dealer's decisions as to what it charges for its products. For example, an agreement to terminate a discounter where the reason for doing so is that the

dealer is a discounter or is charging prices that are lower than the competitor's would constitute a violation of this section. If the agreement to terminate is for non-price reasons, such as dirty showrooms or poor service, then it is not covered.

SECTION 4

This section makes clear that this bill does not change the requirements of the Sherman Act that a violation of sections 1 or 3 of the Sherman Act requires the finding of an illegal contract, combination, or conspiracy.

SECTION 5

This section makes clear that the bill does not affect application of the rule-of-reason standard to vertical location clauses or vertical territorial restraints.

VII. Estimated Cost of Legislation

In accordance with paragraph 11(a) of Rule XXVI of the Standing Rules of the Senate and section 404 of the Congressional Budget Act of 1974, the committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. Congress,
Congressional Budget Office,
Washington, DC, March 2, 1990.

Hon. Joseph R. Biden, Jr.,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 865, the Consumer Protection Against Price-Fixing Act of 1989, as ordered reported by the Senate Committee on the Judiciary, February 22, 1990.

Based on information from the Department of Justice (DOJ) and the Administrative Office of the U.S. Courts, CBO does not expect S. 865 to significantly affect the costs of DOJ's antitrust enforcement investigations and prosecutions, nor the costs of the federal court system. Therefore, CBO estimates that enactment of the bill would result in no significant cost to the federal government and in no cost to state or local governments.

S. 865 would amend the antitrust laws to codify the *per se* rule against resale price maintenance, or vertical price-fixing. The *per se* rule is a judicial presumption that certain types of arrangements between sellers of goods or services and purchasers of those goods or services are anti-competitive, without the need to prove the economic consequences of those arrangements. The bill would codify that such vertical price-fixing arrangements are illegal *per se*, whether or not a specific price or price level is agreed upon. (S. 865 would not apply to arrangements between manufacturers and distributors affecting maximum prices.) The bill would also clarify the circumstances under which a court must allow a trier of fact to determine if there has been a violation of the antitrust laws relating to vertical price-fixing.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mitchell Rosenfeld, who can be reached at 226–2860.

Sincerely,

ROBERT D. REISCHAUER,
Director.

VIII. REGULATORY IMPACT STATEMENT

Pursuant to paragraph 11(b), Rule XXVI of the Standing Rules of the Senate, the committee, after due consideration, concludes that the act will not have any direct regulatory impact.

IX. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of Rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 865, as reported, are shown as follow (existing law proposed to be omitted is enclosed in black brackets; new matter is printed in italic, existing law in which no change is proposed is shown in roman):

SHERMAN ANTITRUST ACT

AN ACT To protect trade against unlawful restraints and monopolies, Fifty-First Congress, approved July 2, 1890 (26 Stat. 209, as amended; 15 U.S.C. 1).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Sherman Act". (90 Stat. 1397; 15 U.S.C. 1, note)

Trusts, etc., in restraint of trade illegal; penalty (26 Stat. 209; 88 Stat. 1708; 89 Stat. 801; 15 U.S.C. 1).

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

* * * * * * *

Forfeiture of property in transit (26 Stat. 210; 15 U.S.C. 6).

SEC. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

Suits by persons injured (26 Stat. 210; 69 Stat. 283; 15 U.S.C. 15 and note).

[Sec. 7. Repealed.]

SEC. 8. (a)(1)(A) In any civil action based on section 1 or 3 of this Act, including an action brought by the United States or by a State

attorney general, or by the Federal Trade Commission under section 15 of the Federal Trade Commission Act, which alleges a contract, combination or conspiracy to set, change, or maintain prices, if pursuant to the Federal Rules of Civil Procedure the court finds that there is sufficient evidence, direct or circumstantial, from which a trier of fact could reasonably conclude that a person who sells a good or service to the claimant for resale entered into a contract, combination, or conspiracy with a competitor of such claimant to curtail or eliminate price competition by such claimant in the resale of such good or service, then the court shall permit the trier of fact to consider whether such person and such competitor engaged in concerted action to set, change, or maintain prices for such good or service in violation of such section.

"(B) For purposes of paragraph (1), the court shall find the existence of 'sufficient evidence' that a person who sells a good or service entered into a contract, combination, or conspiracy if the claimant presents sufficient evidence that such person—

"(i) received from a competitor of the claimant an express or implied request or demand, including a threat to discontinue an existing business arrangement, that the seller take steps to curtail or eliminate price competition by the claimant in the resale of such good or service, and

"(ii) because of such request, demand, or threat terminated the claimant as buyer of such good or service for resale or refused to continue to supply to the claimant some or all of such goods or services requested by the claimant: Provided, That a termination or refusal to supply is made 'because of such request, demand, or threat' only if such request, demand or threat is the major cause of such termination or refusal to supply.

"(2) The court shall not permit the trier of fact to consider whether such person and such competitor engaged in concerted action to set, change, or maintain prices for such good or service in violation of such section if the court determines that the trier of fact could only find that such person and such competitor engaged in concerted action by making inferences which are implausible.

"(b) In any civil action based on section 1 or 3 of this Act, including an action brought by the Federal Trade Commission under section 5 of the Federal Trade Commission Act, which alleges a contract, combination, or conspiracy to set, change or maintain prices, the fact that the seller of a good or service and the purchaser of a good or service entered into an agreement to set, change, or maintain the resale price of a good or service shall be sufficient to constitute a violation of such section, except that this section shall not apply when the agreement to set, change, or maintain the resale price of a good or service is an agreement to set, change or maintain the maximum resale price of a good or service. An agreement between the seller of a good or service and the purchaser of a good or service to terminate another purchaser as a dealer or to refuse to supply such other purchaser because of that purchaser's pricing policies shall constitute a violation of this section, whether or not a specific price or price level is agreed upon.".

"Person" or "persons" defined (26 Stat. 210; 15 U.S.C. 7).

SEC. [8.] *9.* That the word "person", or "persons", wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

* * * * * * *

X. ADDITIONAL VIEWS OF SENATOR CHARLES E. GRASSLEY

Last Congress, Senators Metzenbaum, DeConcini, Leahy, myself and others labored mightily to produce S. 430—the "Retail Competition Enforcement Act".

S. 430 has an important, but modest purpose: to codify the "*per se*" rule against vertical price-fixing, and to change the quantum of proof needed to be offered by a terminated dealer plaintiff to survive a manufacturer defendant's motion for summary judgment. I was happy to work on and to cosponsor this bill with my colleagues. I was also pleased that S. 430 enjoyed wide support among discount retailers and consumers. This bill may well have been on its way to Senate passage in 1988.

Then came the Supreme Court's decision in the *Sharp* case, holding that a decision by a manufacturer to terminate a discounter will be judged under the "rule of reason," unless there was some evidence that the manufacturer and the surviving full-service dealer had some kind of an understanding on price. The Supreme Court opinion in *Sharp* did not specify what evidence is required, but it is noteworthy that the opinion affirmed a fifth circuit decision that found it sufficient for liability if the manufacturer and the surviving dealer "expressly or impliedly agree to set its prices at some level, though not a specific one".

Notwithstanding the cataclysmic language in the majority report, this hardly means that an illegal resale-price agreement cannot be proved. Rather, it means that without some evidence of an understanding on resale prices or price levels, a dealer termination is not appropriate for "*per se*" treatment. After *Sharp,* a terminated plaintiff need not show an iron-clad agreement to set prices or even a price range. The illegal agreement can instead be implied by the facts uncovered during discovery. Indeed, the *same* evidence which shows the illegal conspiracy to terminate a dealer can also be used to show the agreement on price or price levels. Thus, *Sharp* does not require proof of "two separate agreements," as is often alleged. Leading antitrust plaintiff attorneys agree with this analysis that *Sharp* can be overcome, in the proper case:

> In cases like *Sharp,* where there is a clear division between price and nonprice evidence, juries can be expected to reach the same result following *Sharp's* newly required instruction. Denying that price was a motive, and denying any agreement at all usually go hand in hand: the manufacturer claims to have acted on its own for nonprice reasons like maintaining services or advertising; the terminated dealer argues that the real motive was an agreement to fix or maintain prices. The jury that decides the manufacturer is not telling the truth about its stated nonprice con-

cerns probably will not believe its testimony that it did not intend to set a price range.

McArthur, John B., "What's Left After *Sharp*", 2 Antitrust 10, 11 (Fall 1988).

I would also point out that *Sharp* did not upset the established rule that agreements to maintain or stabilize prices, as well as to "set" them, will be *"per se"* illegal. Thus, terminated dealers can still win resale price maintenance cases. But to do so, they must be diligent in their search for evidence of price concerns. They must uncover evidence that the stated non-price reasons for its termination are a mere pretext.

This bill would change all that. It not only changes the evidentiary rule laid out in *Monsanto*—a move I continue to support; but its overruling of *Sharp* turns virtually every dealer termination into treble-damage liability. Though I am troubled by post-*Sharp* cases such as *The Jeanery, Inc.* v. *James Jeans, Inc.* and *Toys "R" Us, Inc.* v. *R.H. Macy & Co.*, I cannot, at this point, support such a move. As presently drafted, S. 865 would simply catch too many blameless, unwary suppliers and dealers in a treble damage web.

Most significantly for me, the bill as reported by the Judiciary Committee blurs the careful distinction drawn in both the *Dr. Miles* and *Colgate* cases between unlawful concerted activities and legitimate unilateral conduct by manufacturers or suppliers.

The *Colgate* doctrine—that a manufacturer is free to announce resale prices or contract terms and enforce adherence to those prices or terms by terminating non-complying distributors or dealers, or by refusing to deal with distributors or dealers who violate those prices or terms—is as venerable as the *"per se"* rule itself. A manufacturer's decision to terminate, or refuse to continue to supply, a distributor because the manufacturer independently concludes that the distributor's pricing or other behavior does not meet the manufacturer's objectives has never been a *"per se"* violation of the antitrust laws, unless it is the product of an illegal conspiracy to fix prices.

In contrast, an express or implied agreement between a manufacturer and its dealers or distributors to fix resale prices or price levels has long been considered a *"per se"* violation of the Sherman Act. This is the real holding in *Sharp*, and as such, it is not terribly remarkable. Perhaps that is why Justice Scalia's 6–2 opinion for the Court was embraced by both "conservative" and "liberal" members.

In my judgment S. 865, perhaps unintentionally, undermines this careful distinction between unilateral and concerted conduct. Preserving this distinction is critical to my potential support of this legislation.

To illustrate, in the real world of retailing, manufacturers necessarily have to rely on their distributor networks to help ensure that other dealers comply with price and non-price contractual requirements. A rival retailer may often complain to a manufacturer that another retailer is not living up to the terms of the contract, and thus is "undercutting" the competing retailer's price.

If the manufacturer acts independently or unilaterally to terminate the non-complying retailer, the sponsors of S. 865 try to

assure us that this action is protected by *Colgate*. But what if the complaining retailer—perhaps one unskilled in antitrust hairsplitting—utters a "smoking gun" phrase during the communication, suggesting that the manufacturer "take care of" the discounter? Here, S. 865 says that if the retailer is terminated he/she will automatically win treble damages and attorneys fees.

What if, alternatively, a full-price retailer (knowing he/she is in competition with "troublesome" discount retailers) asks his/her manufacturer for an exclusive sales territory, and the manufacturer agrees, resulting in the termination of all other, off-price, retailers? Would this be an agreement "to terminate another purchaser * * * because of that purchaser's pricing policies," thus triggering "*per se*" liability? If so, how can it be squared with section 5 of S. 865, which purports to be faithful to *Sylvania* by protecting "vertical location clauses" or "territorial restraints" from "*per se*" treatment? If not, doesn't it suggest that such exclusive dealing arrangements urged on manufacturers by full-price retailers can be used as a mere subterfuge to reduce price competition?

It is inconceivable to me that we would willingly install a regime whereby hundreds of thousands (perhaps millions) of dollars of liability will turn on such word games played by the unwary. Confusion and ambiguity may make antitrust litigation profitable for both the plaintiff and defense bar, but I sincerely doubt that America's consumers will see the same benefits.

XI. ADDITIONAL VIEWS OF SENATOR GORDON HUMPHREY

I agree with much of what is said by Senator Grassley in his additional views on S. 865. Like Senator Grassley, I cosponsored and supported the narrower approach to resale price maintenance clarification legislation which was contained in S. 430, a bill approved by the Judiciary Committee in the 100th Congress. I cannot support S. 865, however, because it goes too far and will add unnecessary complications to the state of antitrust law in this area.

I supported S. 430 because it focused on making a reasonable adjustment to the burden of proof (in terms of surviving a motion for summary judgment) for terminated retailers seeking to establish that their termination was the result of an illegal price-fixing agreement between the supplier and a competing retailer. I viewed S. 430 as a carefully crafted compromise response to the Supreme Court's decision in the *Monsanto* case.

S. 865 goes beyond that and seeks to overturn yet another Supreme Court decision, *Business Electronics Corp.* v. *Sharp Electronics Corp. Sharp* merely holds that, in order for a dealer termination case to be treated as *"per se"* violation rather than under the "rule of reason", there must be some evidence of an agreement or understanding on resale price or price levels. This does not strike me as an unreasonable standard for calling into play the strict *"per se"* violation rule.

In what I view as an overreaction to the *Sharp* decision, S. 865 would codify standards which could subject a supplier to *"per se"* liability for dealer terminations which have long been recognized as lawful under settle antitrust doctrine.

For example, if a supplier independently concludes that a retailer has violated pricing policies unilaterally imposed by the supplier, the supplier's right to terminate that dealer has long been recognized as lawful under the *Colgate* doctrine. Under S. 865, however, the legality of the supplier's conduct can be tainted merely because a competitor of the validly terminated retailer had registered a complaint with the supplier concerning that retailer's pricing policies. Thus, a supplier's exposure to liability may turn upon what one of his other retailer customer's has said, rather than upon the supplier's own conduct and actual motivation. This does not seem a sound basis for imposing *"per se"* antitrust liability.

This provision could undermine, or at least confuse, well-settled antitrust principles governing unilateral business conduct under the *Colgate* doctrine. Especially in light of the very healthy condition of the retail discount sector today, I cannot agree that the unsettling changes of antitrust law contained in S. 865 are warranted.

XII. MINORITY VIEWS OF SENATORS THURMOND, HATCH, AND SIMPSON

S. 865, The Consumer Protection Against Price-Fixing Act of 1989, if enacted, will do three things: it will codify the *per se* standard of illegality for vertical price-fixing; it will overrule the Supreme Court's 1984 decision in *Monsanto Co.* v. *Spray-Rite Service Corporation,* 465 U.S. 752 (1984); and it will overrule the Supreme Court's 1988 decision in *Business Electronics Corp.* v. *Sharp Electronics Corp,* 485 U.S. 717 (1988). We are opposed to this legislation because we see no legitimate need for its enactment, especially in view of its effect on a long line of antitrust authority concerning vertical restraints and the law of conspiracy. The number of low priced or discount retail outlets is as great as it has ever been, even after *Monsanto* and *Sharp.* Nor will consumers benefit in any other way. This legislation will not lower prices for consumers. Indeed, it is likely that the increased cost of litigation that will inevitably result, will lead to higher consumer prices. Finally, although the supporters of S. 865 have claimed that this legislation is necessary to insure that terminated distributors will be able to present their vertical price-fixing claims to the jury, there is simply no evidence to support the allegation that *Monsanto* and *Sharp* have prevented this from happening.

As Senator Simpson noted in his remarks during the markup of this bill,

> We are told that this bill is as pro-free enterprise as any bill we could conceivably imagine. Nothing can be farther from the truth. This is not a question of whether we could buy product "X" and sell it at whatever price we want. This is a question of whether anyone can force a manufacturer to allow me to sell his goods on any terms I want. That is not free enterprise. That is *forced* enterprise.

Those who support this legislation argue, among other reasons, that unless S. 865 is enacted, low priced or discount stores will be driven out of business, and consumers will be subjected to higher prices. The facts indicate otherwise, however, and demonstrate that discount stores, without this legislation, and in the aftermath of *Monsanto* and *Sharp,* are flourishing. Recent statistics indicate that there are numerous publicly traded discount companies, including K-Mart, Wal-Mart, and Burlington Coat. According to one of the discount trade publications, in terms of dollar volume, discount stores are the largest retailers of housewares and gifts, infants' wear, domestics, toys, small electrics, stationery and greeting cards. Moreover, they continue to be among the leading retailers of cameras and photo supplies, sporting goods and luggage, lawn and garden supplies, automotive accessories, and consumer electronics.

More recently, the New York Times reported on February 28, 1990, that Wal-Mart, currently ranked third among the nation's mass merchandise retailers, reported 1989 profits in excess of $1 billion, an increase of 28.6 percent over 1988. Sales for 1989 rose by 25.2 percent, to $25.8 billion. The article also noted that Wal-Mart's total revenue for 1989 was more than triple its $8.5 billion in revenues posted in 1986. In other words, despite the *Monsanto* decision, and despite the *Sharp* decision, Wal-Mart continues to experience explosive growth, and analysts quoted by the New York Times, expect that growth to continue.

Proponents of S. 865 also argue that the effect of *Monsanto* has been to prevent terminated dealers from presenting their price-fixing claims to a jury, and that this situation will inevitably worsen because of *Sharp*. Although it is always possible to find and cite a "worst case", it is simply not true that plaintiffs have been prevented from reaching the jury with their claims. A quick review of reported cases since the *Monsanto* decision indicates that there have been at least 22 reported cases from nine different judicial circuits in which terminated dealers, or alleged victims of analogous vertical conspiracies, have won the right to present their claims to the jury. Six cases have resulted in jury verdicts for the plaintiffs, with treble damage awards ranging as high as $4.6 million. In the *Monsanto* case itself, the plaintiff was awarded damages of $10.5 million. Finally, seven different United States Court of Appeals have either upheld jury verdicts for plaintiffs or reversed summary disposition and remanded for trials.

Codification of the Per Se Rule

S. 865 codifies the *per se* rule against resale price maintenance. Although resale price maintenance is *per se* illegal under current law, codifying the *per se* rule is neither useful nor effective. In recent years, there has been increasing debate about the *per se* rule as applied to vertical price-fixing. Despite the views on either side of this issue, it would be far wiser not to codify the *per se* illegality standard and to allow the courts full flexibility to hear and analyze all the relevant economic and legal issues.

The best example of the need for judicial flexibility is the history of nonprice vertical restraints. In 1963, in *White Motor Co.* v. *United States*, 372 U.S. 253 (1963), the Supreme Court decided that nonprice vertical restraints should be evaluated under the rule of reason. Only 4 years later, in *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), the Court felt prepared to issue a *per se* rule prohibiting agreements between manufacturers and dealers limiting dealers' rights to sell outside certain territories or to unfranchised customers. There followed 10 years of confusion about the scope of the rule and debate over its wisdom. In 1977, in *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977), the Supreme Court reconsidered the issue, overruling its prior *per se* decision and applying a rule-of-reason analysis to nonprice vertical restraints. The Court concluded that a *per se* rule that did not rest on the competitive effects of the proscribed conduct would produce bad results in some cases. It held that any *per se* rule should be "based

on demonstrable economic effect rather than * * * upon formalistic line drawing." *Id.* at 58–59.

This history clearly establishes that the courts must be able to interpret and modify *per se* antitrust rules if these rules are to continue to have rational and beneficial effects. It should be noted, and remembered, that the *per se* rule is a judicial invention created to dispense with the need for a rule of reason analysis in each and every antitrust case. It is appropriate only for conduct that is manifestly anticompetitive. As the Court held in *National Collegiate Athletic Assn.* v. *Board of Regents of University of Oklahoma*, 468 U.S. 85, 103–04 (1984):

> *Per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct.

To the extent this rule is a judicial invention, it should remain within the purview of the judiciary.

OVERRULE OF MONSANTO

S. 865 also overrules the Supreme Court's 1984 decision in *Monsanto* v. *Spray-Rite Service Corp.*, *supra.* In that decision, which was decided by a vote of 8–0, the Supreme Court held that a conspiracy to set vertical prices, in violation of section 1 of the Sherman Act, is not established by proof that a manufacturer terminated a distributor following, or even in response to, price complaints by other dealers. The Court held that

> [S]omething more than evidence of complaints is needed. There must be evidence which tends to exclude the possibility that the manufacturer and non-terminated distributors were acting independently. *Id.* at 764.

The Court stressed that:

> [It] is of considerable importance that independent action by the manufacturer, and concerted action on nonprice restrictions, be distinguished from price-fixing agreements, since under present law the latter are subject to *per se* treatment and treble damages. *Id.* at 763.

The proponents of S. 865 claim that the language in *Monsanto* is ambiguous and has engendered considerable confusion in the lower courts concerning the application of evidentiary standards in vertical price-fixing cases. We do not agree. *Monsanto* clearly articulates the appropriate evidentiary standard applicable to dealer termination cases. If there is confusion among lower court decisions, or if the lower courts are applying incorrect standards, the more appropriate way to correct the situation is through the judicial process, and not through legislation like S. 865, which is itself ambiguous and confusing.

Some have argued that the evidentiary standard established by *Monsanto* is so difficult for a plaintiff to meet that it is virtually impossible for a dealer termination case to reach the jury. Such an argument simply has no validity. In *Monsanto* itself, the Court found more than enough evidence to support the existence of price-

fixing agreements and termination of Spray-Rite, pursuant to the agreements.

Spray-Rite was an authorized distributor of Monsanto herbicides from 1957 to 1968. In 1968, after Monsanto declined to renew Spray-Rite's distributorship, Spray-Rite brought an action against Monsanto under section 1 of the Sherman Act, claiming that it was terminated pursuant to a conspiracy between Monsanto and some of its distributors to fix the resale prices of Monsanto herbicides. The jury found for Spray-Rite and awarded $3.5 million in damages before trebling. On appeal, the Court of Appeals affirmed and stated that "proof of termination following competitor complaints is sufficient to support an inference of concerted action."

The Supreme Court reversed the holding of the Court of Appeals, but found that Spray-Rite presented enough evidence to prove that it had been the victim of an illegal price-fixing agreement. The Court found that there was direct testimony by a Monsanto district manager that on at least two occasions after Spray-Rite was terminated, Monsanto advised price-cutting distributors that they would not receive adequate supplies if they did not maintain the suggested resale prices. After one of the distributors still did not comply, its parent company was informed of the situation and the parent instructed its subsidiary to conform to the resale price. There was also a distributor newsletter, which the Court described as a "more ambiguous example", which stated that "every effort will be made to maintain a minimum market price level."

The Court also found that there was ample evidence to support an inference that Spray-Rite had been terminated pursuant to the price-fixing agreement. In a meeting between Spray-Rite and Monsanto following the termination, one of the first things the Monsanto official referred to was the many complaints it had received concerning Spray-Rite's prices. In addition, there was evidence that Spray-Rite had never been informed of the alleged criteria which led to its termination, and that on several occasions from 1965–1966, Spray-Rite had been approached by Monsanto officials, informed of complaints from other distributors, and asked to maintain its prices. Finally, Spray-Rite testified that Monsanto made explicit threats to terminate if Spray-Rite did not raise its prices.

In stark contrast to the fact that this legislation is not needed to clear up any "confusing" or "ambiguous" evidentiary standard in vertical price-fixing cases, is the reality that S. 865 will wreak havoc with long-established antitrust principles and will seriously undermine, if not effectively repeal, the longstanding *Colgate* doctrine and the law of conspiracy.

In *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919), the Supreme Court made clear that:

> In the absence of any purpose to create or maintan a monopoly, the [Sherman] act does not restrict the long recognized right of trader or manufacturer * * * freely to exercise his own independent discretion as to parties with whom he will deal. *Id.* at 307.

In *Monsanto*, the Court underscored this point. In its effort to balance the right of a manufacturer to deal independently with whom-

ever it wishes, and the right of a distributor to be free from illegal conspiracies, the Court stressed that,

> There must be evidence which tends to exclude the possibility that the manufacturer and non-terminated distributors were acting independently. 465 U.S. at 764

Because S. 865 sanctions the use of ambiguous evidence to prove the existence of a conspiracy, the line between independent and concerted activity will be unavoidably blurred and independent, lawful activity will inevitably be condemned.

Senator Grassley, in his Additional Views, provides a graphic example of the difficulty which S. 865 presents in this area. As he notes, if a rival retailer complains to a manufacturer that another retailer is not living up to the terms of his contractual agreement, depending on the phrasing of his complaint, a jury could as easily find that the subsequent termination was an agreement to fix prices as it could find legitimate unilateral action protected by *Colgate.*

Furthermore, S. 865 undermines a long list of antitrust and other cases dealing with conspiracy. In *American Tobacco Co.* v. *United States,* 328 U.S. 781(1946), the Court defined a conspiracy as a "a unity of purpose of a common design and understanding, or meeting of minds in an unlawful arrangement." Id. at 810."

The conspiracy can be proven either through an explicit agreement or an implicit understanding, but in any event it is necessary to prove that there was "a meeting of minds in an unlawful arrangement." S. 865 allows a jury to infer a conspiracy based on evidence which falls far short of the *American Tobacco,* standard and seriously jeopardizes the traditional law of conspiracy. Even the causal connection between the price complaint and the termination which is required by S. 865, does not prove, without more, that there was any agreement between the manufacturer and the complaining distributor to adhere to resale prices.

Overrule of Sharp

In addition to reversing the Supreme Court's holding in *Monsanto,* S. 865 also reverses the Court's holding in *Business Electronics Corp.* v. *Sharp Electronics Corp., supra.* In *Sharp,* the issue was whether an agreement between a manufacturer and one of its retailers to terminate another retailer because of its pricing practices was *per se* illegal because it was a vertical price-fixing agreement. The Majority Report characterizes the *Sharp* decision as a major departure from previous vertical price-fixing cases, and states that one of the purposes of S. 865 is to reestablish that these kinds of agreements are automatically illegal. However, at the time of the *Sharp* decision, the Supreme Court noted that the seventh, eighth and tenth circuits agreed with the fifth circuit's holding, which it affirmed. Only the third and ninth circuits held otherwise.

The facts of *Sharp* are straightforward. Business Electronics had been the exclusive retailer of Sharp products in the Houston area for several years. In 1972, Sharp appointed Hartwell as a second retailer for the Houston area. Although Sharp published a list of suggested retail prices, its agreements with both retailers left them

free to charge whatever prices they chose. The evidence showed that Business Electronics' prices were often below the suggested retail prices, and generally below the prices charged by Hartwell. There was also evidence that showed that Hartwell sometimes charged prices below the suggested retail prices, but also complained to Sharp about Business Electronics' pricing. After a period of time, Hartwell informed Sharp that it would terminate its relationship with Sharp unless Sharp terminated Business Electronics as a distributor. Sharp terminated Business Electronics, and Business Electronics brought suit.

In the district court, a jury found that there was an agreement between Sharp and Hartwell to terminate Business Electronics because of its price cutting, and, based on a *per se* analysis, awarded plaintiffs $600,000 in damages.

On appeal, the Fifth Circuit reversed. It held that in order for the agreement between Sharp and Hartwell to be illegal *per se,* it was necessary that the agreement "expressly or impliedly * * * set * * * prices at some level, though not a specific one. The distributor cannot retain complete freedom to set whatever price it chooses."

The Supreme Court affirmed. The Court held that "economic analysis supports the view, and no precedent opposes it, that a vertical restraint is not illegal *per se* unless it includes some agreement on price or price levels."

Relying on a long line of cases interpreting section 1 of the Sherman Act, the Court stated that its

> approach to the question presented in the present case is guided by the premises of *GTE Sylvania* and *Monsanto*: that there is a presumption in favor of a rule-of-reason standard; that departure from that standard must be justified by demonstrable economic effect, such as the facilitation of cartelizing, rather than formalistic distinctions; that interbrand competition is the primary concern of the antitrust laws; and that rules in this area should be formulated with a view towards protecting the doctrine of *GTE Sylvania*.

It is worth noting that both of these decisions, which are part of a long line of Supreme Court decisions interpreting the law of vertical price-fixing, were decided by solid majorities of the Supreme Court. The *Monsanto* decision was unanimous, with Justice White not participating, and the *Sharp* case was a 6–2 decision, with Justice Kennedy not participating. Given these majorities, it does not appear that these decisions were the result of strong ideological differences as to antitrust law, the law of conspiracy, or the evidentiary requirements necessary to prove a conspiracy. On the contrary, the decisions are clear and straightforward on two issues:

(1) What kind of proof is necessary to prove a vertical price-fixing case; and,

(2) what kinds of agreements constitute price-fixing agreements subject to the *per se* rule, rather than the rule of reason.

The Majority Report bemoans the fact that the *Sharp* decision has fundamentally changed the landscape for resale price mainte-

nance cases, and cites as a recent example *Toys "R" Us, Inc.* v. *R.H. Macy & Co., Inc.*, 1990–1 Trade Cas. par. 68,890 (S.D.N.Y. 1990). Acknowledging, as does Senator Grassley in his Additional Views, that there are some post-*Monsanto* and *Sharp* decisions that are troubling, the *Macy* case is not one of those decisions. Unlike some cases in which one could argue that there was evidence to support the existence of an agreement, even under *Monsanto* and *Sharp*, the court in *Macy* was emphatic that no such evidence presented itself. Noting that the plaintiff proceeded only on *per se* allegations of Sherman Act violations, and not on any claims based on the rule of reason analysis, the court found that there was no evidence that Macy agreed with either of its suppliers as to the prices it would charge.

> [T]here is nothing in the record to indicate that Macy agreed with either Backflips or Little Dippers as to a level of retail prices which Macy would charge. Nothing suggests that the manufacturers were seeking to establish such a level of retail prices. It was Macy who was seeking to protect its own keystone prices. In any event, it was Macy's decision, and its decision alone, which determined Macy's prices. Macy made no commitment to Backflips or Little Dippers as to these prices, nor did these manufacturers seek any such commitment." Id. at 62,790.

Conclusion

It was not by accident that the antitrust laws were framed broadly rather than containing a long and detailed laundry list of proscribed activities. The drafters of the Sherman Act intended to draft a general statute, to be amplified as necessary through judicial reasoning and by experience over time, including changing circumstances. Senator Sherman himself remarked that:

> It is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case. All that we, as lawmakers, can do, is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law, as the courts of England and the United States have done for centuries. 21 Cong. Rec. 2460 (1889).

Statutory rules phrased in terms of specific practices rather than in terms of competitive purpose or effect lack flexibility needed for optimum antitrust enforcement. Sound antitrust rules are simply not amenable to fixed, detailed, articulation. Not every court decision is well conceived, and even some decisions that are correct when issued, appear later to be based on weak findings and logic. The common-law process can correct for these. Legislation along the lines of S. 865 raises the specter of far more serious problems, which would be far more difficult to correct.

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